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REPORTS

OF MALAYSIAN AND SINGAPORE CASES DETERMINED IN THE HIGH COURTS,
THE FEDERAL COURT OF MALAYSIA, THE COURT OF APPEAL AND THE COURT OF
CRIMINAL APPEAL OF SINGAPORE, AND THE PRIVY COUNCIL.

SINGAPORE REPORTS

**THE "VIRA II";
WONG WING FAI CO. S.A. v.
THE NETHERLANDS INSURANCE CO.
ESTABLISHED 1845 LTD. & ANOR.;
WONG WING FAI CO. S.A. v. A.D. SHEAD**

[O.C.J. (Sinnathuray J.) January 8, 1980]

[Singapore — Suit No. 4123 of 1976 consolidated with Suit
No. 2323 of 1977]

Shipping Law — Marine insurance — Policies — "Hull policy" and "war risk policy" — Ship insured under both heads — Ship seized by crew and disappeared — Whether "actual total loss" or "barratry by crew and/or seizure or piracy" — Marine Insurance Act, 1906 of the United Kingdom, ss. 57 & 58.

Insurance — Marine insurance — "Hull policy" and "war risk policy" — Ship seized by crew and disappeared.

The plaintiffs in this case were the owners of the ship "Vira II" of the Port of Panama. She carried two policies of marine insurance known as a "hull policy" and a "war risk policy". Under the hull policy, the first defendant (in Suit No. 4123 of 1976) insured her for US\$220,000 for twelve months with effect from January 1, 1976. The perils insured against included, *inter alia*, loss of the vessel due to barratry of the master and mariners. Under the war risk policy, the second defendant who represented certain other underwriters in Suit No. 2323 of 1977 insured the ship for US\$300,000 for twelve months with effect from February 24, 1976. Under this policy, the perils insured against included, *inter alia*, loss of the vessel due to capture, seizure, or piracy.

The plaintiffs claimed that during the currency of the two policies, on March 26, 1976, the ship was totally lost as a result of one or other of the perils she was insured against. The two suits were heard as a consolidated action.

The facts revealed that in March 1976, the ship was in Singapore under the command of a master of Indonesian national. The chief officer was also an Indonesian and the radio officer was a Singaporean. The rest of the crew, eighteen of them, were Khmers, nationals of the State, as it was then, Cambodia. The ship was on charter to British Petroleum.

On March 25 and 26, fuel oil were loaded on the ship in Singapore. The ship left for Penang on March 26 at about 11 a.m. When she was full ahead, the chief officer and radio officer went down for their meals. The master was on the bridge with the quarter-master at the wheel. At about 11.30 a.m. the master heard a shot and a scream. They came from below where the two officers were having their meals. He saw the radio officer running down the stairs to the stern of the ship. There was blood on his left arm. A member of the crew armed with a pistol chased the radio officer who jumped overboard without a life-jacket. The master himself was confronted with four members of the crew who were armed. One of the crew members told him that the ship was heading for Cambodia and took over the wheel. When the ship had just passed the Horsburgh Lighthouse, the master made his escape by jumping overboard with two life-buoys.

A The ship which was still heading at 80° disappeared into the horizon. Before it did, the master saw the ship change its course to port — in a northerly direction towards Cambodia. The master was picked up after 26 hours by a fisherman.

On March 30, the solicitor for the plaintiffs informed the two insurers of the incident. There was no trace of the vessel despite enquiries and investigations made by all parties including the Salvage Association.

B Held, allowing the claim against the second defendant and dismissing the claim against first defendants: (1) the term "barratry" is fraud or gross negligence (as used in civil law) on the part of the master and/or crew, to the detriment or prejudice of the owner without his consent; the essence of barratry of the master or crew is that it is directed wholly or primarily to the detriment or prejudice of the owner;

C (2) in the present case, the crew of "Vira II" forcibly took possession of the ship; there was therefore seizure of the ship, a peril insured for by the plaintiffs with the second defendant and expressly excluded in the hull policy of the first defendants.

Cases referred to:-

- (1) *Polurrian Steamship Co. Ltd. v. Young* 19 Com. Cas. 143, 153.
- (2) *Marstrand Fishing Co. Ltd. v. Beer* [1937] 1 All E.R. 158, 164.
- (3) *"The Hai Hsuan"* [1958] 1 Ll. L.R. 351.
- (4) *Naylor v. Palmer* 155 E.R. 1550.
- (5) *Palmer v. Naylor* 156 E.R. 492.
- (6) *Kleinwort v. Shepard* 120 E.R. 977.
- (7) *Cory v. Burr* (1882-3) 8 App. Cas. 393.
- (8) *Republic of Bolivia v. Indemnity Mutual Marine Assurance Co. Ltd.* [1909] 1 K.B. 785.

CIVIL SUIT.

G. Pannirselvam (Mrs. J. Prakash with him) for the plaintiffs.

M. Karthigesu for the first defendants.

F G.K. Emmanuel for the second defendant.

Cur. Adv. Vult.

Sinnathuray J.: The plaintiffs were the owners of the ship "Vira II" of the port of Panama. She carried two policies of marine insurance which I describe shortly as a "hull policy", and a "war risk policy".

G Under the hull policy, the defendants (hereinafter referred to as "first defendants") in Suit No. 4123 of 1976 insured her for US\$220,000 for twelve calendar months with effect from January 1, 1976. The perils insured against included, *inter alia*, loss of the vessel due to barratry of the master and mariners. Under the war risk policy, the defendant (hereinafter referred to as "second defendant") who represents certain other underwriters in Suit No. 2323 of 1977 insured the ship

for US\$300,000 for twelve calendar months with effect from February 24, 1976. Under this policy, the perils insured against included, *inter alia*, loss of the vessel due to capture, seizure, or piracy.

The plaintiffs claim that during the currency of the two policies, on March 26, 1976, the ship was totally lost as a result of one or other of the perils she was insured against. The two suits were heard as a consolidated action.

The uncontested facts are these. "Vira II" was a motor tanker. In March 1976 she was in Singapore under the command of one Tengku Kamrul, an Indonesian national who held a master's certificate for local and home trade. The chief officer, too, was an Indonesian. The radio officer was a Singaporean. The rest of the crew, eighteen of them, were Khmers, nationals of the State, as it was then, Cambodia.

The ship was on charter to British Petroleum. During the month of March, the ship with the crew I have mentioned made two trips to Penang with cargoes of fuel oil. The master said that during these voyages he had no problems with the crew, though both in Singapore and Penang the Cambodian crew were forbidden by the Immigration authorities to go ashore.

On March 25 and 26, 1,750 tons of fuel oil were loaded on the ship at the Caltex depot in Jurong. The ship then went to the Eastern Anchorage to obtain clearance to leave Singapore. From there, at about 11 a.m., on March 26 the ship left for Penang. When she was full ahead, the chief officer and radio officer went down for their meals. The master was on the bridge with the quarter-master at the wheel.

At about 11.30 a.m. the master heard a shot and a scream. They came from below where the two officers were having their meals. He saw the radio officer running down the stairs to the stern of the ship. There was blood on his left arm. He saw Hock Ly, a member of the crew, armed with a pistol, chasing the radio officer. The radio officer jumped overboard without a life-jacket.

The master stopped the engine and steered the ship starboard to rescue the radio officer. Whilst the ship was swinging round, he looked out of the bridge to the stern of the vessel and saw the radio officer swimming.

Four members of the crew then came to the bridge. They looked hostile. One of them, Hock Ly, was still holding the pistol. Another, Kan Sophon, had a bloodstained axe with a broken handle. There was blood on his shirt. The third had a dagger. The fourth held another pistol. The master concluded that it was a mutiny, and was frightened for himself. Hock Ly told the master: "Take it easy, Captain. Ship go to Cambodia." The master replied that they first rescue the radio officer. There was no response from the intruders. Instead, Hock Ly put the engine to full ahead.

The master was unable to give any fresh orders to rescue the radio officer as Hock Ly had the pistol pointed at him. Hock Ly asked the master the direct

A course to Horsburgh Lighthouse. The master replied that it was 80 degrees. The ship then proceeded on that course with Hock Ly at the wheel.

The ship remained on that course for about three hours. When the ship had just passed the lighthouse, on its portside, the master asked for permission to go to the toilet. Hock Ly gave him permission but told him to return quickly. The master had lied to Hock Ly. He went to the cabin and took a small bag which had all his documents. He then ran to the stern of the ship, took two life-buoys, threw them into the sea, and jumped overboard. As he saw the situation, he had two alternatives. If he remained on board, he might be dead. He took the chance by jumping overboard. The ship which was still heading at 80 degrees disappeared into the horizon. Before it did, the master saw the ship change its course to port — in a northerly direction towards Cambodia.

The master was in the water for about 26 hours. The next day, when he was near land, he was picked up first by a fisherman and later by the Indonesian Navy. Finally, he was taken to Tanjong Pinang where he was questioned and released. Since he jumped off the ship, he had not seen "Vira II", nor either the radio officer or the chief officer. As regards the latter, when he was in Djakarta, he went to the chief officer's home but he was not there. When he was in the Rhio Islands he did see three members of the crew but has not seen them since. I was informed by Mr. Selvam from the Bar that the three of them are now refugees in France.

On March 30, the solicitors for the plaintiffs informed the two insurers of the incident. It is sufficient to note that thereafter enquiries and investigations were made by all parties interested in the ship, including the Salvage Association. There was no trace of the vessel. In this context, having regard to the correspondence in the agreed bundle, and the evidence of Mrs. J. Prakash for the plaintiffs, I am satisfied that all that can be reasonably done had been done.

At the conclusion of the hearing, the issues for decision were these:

- (a) Was the ship irretrievably lost?
- (b) Under the hull policy, was there barratry by the crew?
- (c) Under the war risk policy, was there seizure or piracy?

H Actual Total Loss of Ship

On this issue the burden of proof is on the plaintiffs, and, the date of determination of the actual total loss, in this case, is the date of the issue of the writ, namely, December 28, 1976, as the plaintiffs had not earlier given to their insurers, the defendants, notices of abandonment. (See *Polurrian Steamship Co. Ltd. v. Young*; ⁽¹⁾ *Marstrand Fishing Co. Ltd. v. Beer* ⁽²⁾).

For the plaintiffs, I was referred to section 58 of the Marine Insurance Act, 1906 of the United Kingdom (the Act) which is applicable in Singapore. It provides: "Where the ship concerned in the adventure is missing, and after the lapse of a reasonable time no news of her has been received, an actual total

loss may be presumed." And under section 88 of the Act, "... the question what is reasonable time is a question of fact." However, for the first defendants, it was submitted that in considering actual total loss I should have recourse, not to section 58 but to section 57 of the Act. It defines actual total loss. It provides, *inter alia*, that there is an actual total loss where the assured is irretrievably deprived of the subject-matter insured. The submission was that there is no evidence that the ship was irretrievably lost to amount to an actual total loss.

I am satisfied that section 57 of the Act is not the appropriate section to apply to the facts of this case. It is true that on December 28, 1976, nobody could say that "Vira II" was irretrievably lost. What was known then was that on March 26 she was taken over by the Cambodian crew outside Singapore waters. The fate of the chief officer, the only person on board the ship with experience in navigation, was unknown and he has since not been heard of. The ship was heading towards the direction of Cambodia which was hundreds of nautical miles away from Singapore. Days later three members of the crew were seen in the Rhio Islands. It is therefore not to be concluded that the ship got to Cambodia. She could have gone anywhere, or, she may have sunk. In late July the plaintiffs' solicitors received communication from the Salvage Association that they had made enquiries in an endeavour to ascertain whether there was any information known of the ship, and that they had drawn a blank. They concluded that "there is little further which can be done to assist at this time." Therefore, the reasonable inference to be drawn from these facts is that the ship was missing. And, as regards missing ships, there is a specific provision in section 58 of the Act which, as a matter of interpretation of statutory provisions, excludes the general provision in section 57. Section 58, however, creates a rebuttable presumption. The plaintiffs rely on it that after a lapse of reasonable time, where no news of the ship has been received, an actual total loss may be presumed.

The next question is whether there has been a lapse of reasonable time. The writ was issued nine months after the ship was last seen. She was in waters where the sea traffic is reportedly heavy. Throughout that period, there had been no news of the ship. I therefore hold that the lapse of time is a reasonable one for actual total loss to be presumed. As there was no evidence in rebuttal by the defendants, "Vira II" was an actual total loss.

Barratry by crew and/or Seizure or Piracy

As was submitted by Mr. Karthigesu for the first defendants, on a finding that the ship was an actual total loss, the contest is between the hull underwriters and the war risk underwriters. There are three possible findings. One is, if the acts of the crew constituted barratry, the first defendants are solely liable. The other is, if the acts of the crew resulted in the seizure of the ship or piracy which the hull policy warranted free of, but which were covered under the war risk policy, then the second defendant is solely liable. The third is, if the acts of the crew were both barratry and seizure or piracy then both the defendants are to share the liability.

A (a) *Barratry*

Rule 11 of the Rules for Construction of Marine Policy merely enlarges the term barratry to include "every wrongful act wilfully committed by the master or crew to the prejudice of the owner, or, as the case may be, the charterer." (See: *Chalmers' Marine Insurance Act*, 1906 page 160/161.) In this case, I am not concerned with barratry against the charterer. From the cases cited to me, I find that except for "*The Hai Hsuan*"⁽³⁾ a case of the United States of America, the other authorities on the term barratry are of the last century, that now, the term in marine law has an artificial ring not easy to explain (*Naylor v. Palmer*;⁽⁴⁾ *Palmer v. Naylor*;⁽⁵⁾ *Kleinwort v. Shepard*;⁽⁶⁾ *Cory v. Burr*⁽⁷⁾). The difficulty is that it has been used by judges synonymous with seizure. It seems to me, however, a distinction has to be drawn between the two, barratry and seizure, because in marine insurance policies a distinction is made between them. For instance, the ordinary hull policy, the Lloyd's S. G. Policy, as a matter of common practice, now has an exclusion clause, the free of capture and seizure clause. What then is, or can be, the distinction? As I understand, the term barratry is fraud or gross negligence (as used in civil law) on the part of the master and/or crew, to the detriment or prejudice of the owner without his consent. In my view the essence of barratry of the master or crew is that it is directed wholly or primarily to the detriment or prejudice of the owner. In one sense all acts of fraud are against the owner. But I would say, given a set of facts, one must inquire into the purpose or motive of the acts of the master or crew and then consider the acts. If the answer is that the acts of the master or crew against the ship were not wholly or primarily directed against the owner, though concomitant, then it is not barratry, and barratry can be kept within marked bounds. The point I make perhaps explains the submission made by Mr. Karthigesu for the first defendants that except for "*The Hai Hsuan*", there is no reported case where barratry was found by a court where the master has had no complicity.

G (b) *Seizure*

In 1859 in *Kleinwort & Anor. v. Shepard*,⁽⁶⁾ a ship had a voyage policy which included barratry of the master and mariners but "warranted free from capture and seizure...". On the voyage from Macao to Havana, on the high seas, the emigrants on board assaulted the captain and crew and took the ship that it was averred for the plaintiffs that she was a total loss. The issue was whether the taking possession of the ship was a "seizure" within the meaning of the warranty.

It was submitted for the plaintiffs that the warranty applied "only to the usual war risk, that of capture and seizure by an ordinary enemy ... and it is therefore to be presumed, in the absence of anything in the policy to show a contrary intention, that it applies only to seizure by belligerent parties." For the defendant, it was contended that "though the terms 'seizure' and 'capture' include seizure and capture by belligerents, there is no authority or usage limiting them to that, or controlling the ordinary mean-

ing of the words, within which such an act as this clearly falls."

Lord Campbell C.J., who delivered the judgment of the court, held "That the loss . . . is a loss by seizure, according to the common meaning of the word in the English language, can admit of no doubt. Dr. Johnson defines "seizure" to be "the act of taking forcible possession. . . . It thus becomes necessary for the plaintiffs to show that the word "seizure" is used in the warranty in some peculiar and limited sense. . . . We believe that a warranty in this form is sometimes introduced into policies, when there is an apprehension of war, with a view to protect the underwriter from belligerent risks. . . . But, where it is introduced, there is no decision that it must be confined to belligerent seizure; and we clearly think that it would extend to a capture or seizure by pirates."

On the argument for the plaintiffs that the "seizure must, at all events, be confined to a seizure by violence from without, excluding anything to be done by those who were lawfully on board the ship", Lord Campbell said: "But what reason is there for such a restriction, in the absence of any allegation upon the record of any peculiar mercantile usage of the expression, and in the absence of any judicial decision imposing this restricted meaning upon it? If the crew, intending to turn pirates, were to murder the captain and to run away with the ship, would not this be a loss by seizure? The [emigrants] were passengers, no doubt: but suppose that, during the voyage of an emigrant ship, the emigrants, intending to turn pirates, should murder the captain and the crew, and run away with the ship, would this not be a loss by seizure? We think that it would." I respectfully concur with everything Lord Campbell said in the case.

(c) Piracy

Finally, a few words on the subject of piracy which was canvassed at the hearing. The leading case on it is *Republic of Bolivia v. Indemnity Mutual Marine Assurance Company, Limited.*^(a) There is the oft-quoted dictum of Kenndy L.J. where he adopted the definition by Carver which states: "Piracy is forcible robbery at sea, whether committed by marauders from outside the ship or by mariners or passengers within it. The essential element is that they violently dispossess the master, and afterwards carry away the ship itself, or any of the goods, with a felonious intent." In this case, too, the common or popular meaning of piracy was expressed by Vaughan Williams L.J. He said that a pirate is "a man who is plundering indiscriminately for his own ends. . . ." The question I ask is: Were the crew of "Vira II" plundering indiscriminately for their own ends? Counsel for the second defendant submitted that they were not. He said that they merely took the vessel to go to Cambodia. But it can be said that the crew having been confined to the ship in Singapore and Penang, and having the desire to return to Cambodia, committed robbery at sea. In my view, the crew of "Vira II" had plundered indiscriminately for their own ends.

There is, however, another question relating to piracy, that is whether there can be piracy when a ship, as in this case, is not in the open sea, a topic

A that was discussed in the Bolivian case but not decided. For myself, too, I would leave it unresolved as I would like to have the benefit of more study.

B In this case I hold that the crew of "Vira II" forcibly took possession of the ship. There was seizure of the ship, a peril insured for by the plaintiffs with the second defendant and expressly excluded in the hull policy of the first defendants. The purpose or motive of the seizure was to go to Cambodia. The acts were not directed wholly or primarily against the owners. The owners lost the ship. But the crew were not committing fraud against the owners, in the accepted meaning of that word, and there was no gross negligence by the master. There will accordingly be judgment for the plaintiffs against the second defendant. The claim against the first defendants is dismissed.

C Two ancillary matters arise from the judgment I have just delivered. Mr. Selvam for the plaintiffs asks that the plaintiffs be paid interest from August 1976 to date of judgment. The reason he gives is that the second defendant had repudiated liability as early as June or July 1976 and in all the circumstances he should be paid interest from at least August. I agree with that and I order that the second defendant pay interest at 8% from August 1976 to date of judgment.

D As regards costs, I am satisfied in this case that the costs of the plaintiffs and of the first defendants should be borne by the second defendant.

E *Claim against first defendants dismissed;*

Claim against second defendant allowed.

Solicitors: Drew & Napier; Karthigesu & Arul; Emmanuel & Barker.

F

CHANG SONG LIANG & ORS. v. THE ATTORNEY-GENERAL, SINGAPORE

[O.C.J. (Wee Chong Jin C.J.) January 10, 1980]

[Singapore — Suit No. 2189 of 1977]

G *Administrative Law — Police — Police officers assaulting accused during investigations — Punishment by Public Service Commission — Whether ultra vires — Police Force Act (Cap. 78), ss. 11, 27, 28A — Police Regulations 1959, regs. 5, 6, 7(1) & 14 — Public Service (Disciplinary Proceedings) Regulations 1970, regs. 4(3) & 7.*

H *Police — Powers of Police Commissioner — Scope of ss. 27 & 28A of Police Force Act (Cap. 78) — Police Regulations 1959, regs. 5, 6, 7(1) & 14 — Public Service (Disciplinary Proceedings) Regulations 1970, regs. 4(3) & 7.*

I The plaintiffs, police officers in this case were each separately charged with having voluntarily causing hurt to one P. on July 12, 1973 for the purpose of extorting information from him which may lead to the detection of an offence. They were each interdicted from the performance of duty on half pay from July 22, 1974 onwards. The criminal charge against them was dropped but they continued to be interdicted from the performance of their duty on half pay. On May 31, 1975, they received identical letters of disciplinary proceedings against them with a view to their dismissal. By a separate letter of the same date, they were each notified that they were interdicted from duty on no pay with effect from June 2, 1975.

The plaintiffs submitted exculpatory statements in answer to the charges made against them but the Public Service